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**PP**

**v.**

**CHAP JEE & ORS**

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HIGH COURT MALAYA, KOTA BHARU
AZMAN ABDULLAH J
[CRIMINAL REVISION NO: 43-12-06-2013]
3 JULY 2013

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***CRIMINAL LAW:*** *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 - Section 51(3) - Application for revision of Magistrate's order - Failure to produce joint report of investigation officer and protection officer - Whether subjects trafficked persons - Whether subjects in need of protection - Whether protection order should be granted - Whether legal error on part of Magistrate - Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 51, 51(3) - Criminal Procedure Code, s. 323*

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Four Burmese ('the subjects') were arrested pursuant to the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act') while they were on their way from Kelantan to Kuala Lumpur. They were subsequently brought before the Magistrate's Court whereupon an Interim Protection Order under s. 44(2) of the Act pending investigation was granted. Thereupon, the investigating officer applied for a Protection Order ('the order') under s. 51(3) of the Act. The Magistrate granted the order for three months. The court, pursuant to s. 323 of the Criminal Procedure Code ('CPC') called for the record to examine the validity, correctness and legality of the order and the regularity of the proceedings in respect of the four subjects. Section 51 of the Act required the investigating officer and the protection officer to prepare a report jointly and to produce the report to the Magistrate during the application of the protection order. However only the report from the protection officer was tendered during the application for the order and no report was prepared by the investigating officer even though the 14 days interim protection order was granted to investigate into the circumstances of the subjects to determine whether they were trafficked persons under the Act. The report by the protection officer was that the subjects came to Malaysia for jobs and on the day of arrest, they were picked by a Malay man at the Malaysian-Thai border. The primary issue was whether the subjects were trafficked persons who were exploited and was in need of protection as prescribed under the Act.

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**Held (setting aside protection order):**

**(1)** The Magistrate erred when he considered that he was satisfied that the subjects were trafficked persons and in need of protection, whereas the report on that matter was never offered. The Magistrate only assumed that the subjects needed protection without scrutinising and examining the details of the report tendered by the protection officer. Receiving the report alone was not sufficient. By doing so, the Magistrate had not exercised his judicial mind. (para 8)

**(2)** The report from the investigating officer was of utmost importance beside one from the protection officer as it would disclose the circumstances and activities of the subjects and whether the subjects were trafficked persons and whether there were in need of protection. Since there was no report from the investigating officer, the consideration of whether the subjects were trafficked persons and needed protection was not sufficiently evaluated. Therefore, the decision of granting the protection order was not properly arrived at. (para 9)

**(3)** Pursuant to s. 51(3) of the Act, the Magistrate, having read the reports, must be satisfied that the subjects were trafficked persons and were in need of care and protection. Therefore, if the subjects did not fall under the definition of trafficked person and only came under the definition of illegal immigrants, then no protection order should be granted. The purpose of protection was to save a person trapped in activities of trafficking in person. Thus, to order them to be placed under the protection home would defeat the purpose of establishing the protection scheme. Therefore, the provisions of the protection order did not apply to the four subjects as they were not trafficked persons as prescribed under the Act. (paras 9, 12 & 13)

**Case(s) referred to:**
*PP lwn. Nam Oithantip [2008] 5 CLJ 285 HC* ***(refd)***
*Siti Rashidah Razali & Yang Lain lwn. PP [2011] 9 CLJ 459 HC* ***(refd)***

**Legislation referred to:**
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 41A, 44(2), 51(3)(a)(ii)
Criminal Procedure Code, s. 323

*For the prosecution - Wan Azimah Yaacob; DPP*

*Reported by Sandra Gabriel*

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## JUDGMENT

**Azman Abdullah J:**

**Introduction**

B **[1]** The Protection Order signed under s. 51(3) of the Anti-Trafficking in Persons and Smuggling of Migrants (herein referred as ATIPSOM) in respect of four subjects; Chap Jee, (male, 19 years old), Muk Kuae (male, 16 years old), Wu Lat Hue (male, 16 years old) and Thar Wue (male, 16 years old) by the Magistrate's Court was brought
C by Public Prosecutor to the attention of the court as to the correctness, legality or propriety of the said order and the regularity of the proceedings. Section 323 of the Criminal Procedure Code was referred to by the court to call for the record and to examine the record of the protection order proceedings in respect of four subjects.

D **Brief Facts**

**[2]** The four male Burmese, aged between 16 to 19 years respectively, were arrested while they were on their way from Rantau Panjang, Kelantan to Kuala Lumpur. The car driven by one Malaysian
E was stopped and they as passengers were arrested since they do not have any travel documents. They were arrested together with the driver pursuant to provisions under ATIPSOM ('the Act'). They were brought before the Magistrate's Court whereupon an Interim Protection Order under s. 44(2) of the Act, pending investigation was granted. After ten
F days, the investigating officer applied for Protection Order under s. 51(3) of the Act. The Magistrate granted the order of protection for three months.

**[3]** Upon examining the record of proceeding, I found that only the report from the protection officer was tendered during the application for
G the order. No report whatsoever was prepared by the investigating officer. The report by the protection officer *inter alia* mentioned about the background of each subject, as they were from Myanmar, came to Malaysia looking for jobs since they were poor farmers in their country and hoping to improve their lives here. On that fateful day, a Malay
H man picked them up at Malaysian-Thai border at Rantau Panjang and heading towards Kuala Lumpur.

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**Preliminary Issue**

**[4]** At the outset of hearing this revision, an important point of law for consideration is whether the Protection Order under s. 51 of the ATIPSOM applies to these four subjects and further, whether the Protection Order under s. 51(3)(a)(ii) of the Act should in the first place be granted.

**[5]** Section 51 of the Act requires that the investigating officer and the protection officer to prepare a report jointly and produce the report to the Magistrate while applying the Protection Order. Section 51 states that:

> 51(1) Where an interim protection order is made under subsection 44(2), within fourteen days from the date of such order:
>
> (a) an enforcement officer shall investigate into the circumstances of the person's case for the purpose of determining whether the person is a trafficked person under this Act; and
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> (b) a Protection Officer shall enquire into the background of that person.
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> (2) Upon completion of the investigation and enquiry under subsection (1), the Enforcement Officer and the Protection Officer **shall jointly prepare a report and produce the report together** with the person before a Magistrate's Court for the purpose of satisfying the Magistrate that such person is a trafficked person under this Act. (emphasis added)
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> (3) Where the Magistrate, having read the report produced under subsection (2), is satisfied that the person brought before him:
>
> (a) is a trafficked person and in need of care and protection, the Magistrate may make a Protection Order:
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> (i) in the case of a trafficked person who is a citizen or permanent resident of Malaysia, ordering that such trafficked person be placed in a place of refuge for a period not exceeding two years from the date of the order; or
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> (ii) in the case of a trafficked person who is a foreign national, ordering that such trafficked person be placed in a place of refuge for a period not exceeding three months from the date of the order, and thereafter to release him to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63.

A (b) is not a trafficked person, the Magistrate may:

(i) in the case of a person who is a citizen or permanent resident of Malaysia, order that person to be released; or

B (ii) in the case of a person who is a foreign national, order that person to be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63.

**[6]** During the proceeding at the Magistrate's Court, only a report C from the protection officer was furnished. No report was prepared by the investigating officer even though 14 days Interim Protection Order was granted under s. 44 to enable them to investigate into the circumstances of the subjects for the purpose of determining whether they were trafficked person under the Act.

D **[7]** The report by the protection officer did not disclose anything about the circumstances of trafficking in person. It only stated the background of the subjects. No single element of trafficking in person can be extracted from the background of the subjects as reported by the protection officer. In hearing the Protection Order application, the E Magistrate must consider not only the report from the protection officer but also to the report by the investigating officer. See the case of *PP lwn. Nam Oithantip* [2008] 5 CLJ 285 where it was decided that the Magistrate has to look into the report of the investigating officer, in granting the order.

F **[8]** The Magistrate has erred in law in granting the order as he only assumed those subjects need protection, after receiving the report from the officer without scrutinising and examining the details of the report tendered. Receiving the report alone is not sufficient. On the surface of the record, the Magistrate erred when he considered that he was G satisfied that the subjects were trafficked persons and in need of protection, whereas the report on that matter was never offered. By doing so, the Magistrate was not exercising his judicial mind.

**[9]** The report from the investigating officer is utmost important beside one from the protection officer as it would disclose the H circumstances and activities of the subjects and from there the Magistrate can ascertain whether the subjects were trafficked person and whether they were in need of protection or not. Since there was no report from the investigation officer, the consideration of whether the subjects were trafficked persons and need protection is not sufficiently

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evaluated and the decision of granting the Protection Order was therefore not properly arrived at. In granting the Protection Order, the Magistrate had acted on blind faith and assumed that the subjects were trafficked person only *vide* the report by the protection officer which incidentally is the only report available to him. Considering the phrases 'trafficked person' and 'in need of protection' as stated in s. 51(3) of the Act, the Magistrate has no basis to decide whether there were grounds to be satisfied that the subjects should be protected. Section 51(3) states:

> s. 51(3) Where the Magistrate, having read the report produced under subsection (2), is **satisfied** that the person brought before him:
>
> (a) is a trafficked person and in need of care and protection, the Magistrate may make a Protection Order: (emphasis added)

**[10]** I believe the word "satisfied" in s. 51(3) is lesser than what is required to achieve the *prima facie*'s standard but the Magistrate still has to put his mind and evaluate whether at the very least, on the surface of the report tendered during the application, whether the facts revealed some circumstances which show the subject was a trafficked person and need protection. The reason being for example, from both reports (the investigating officer and protection officer), if the subjects while they were arrested, revealed that their purpose of entry to Malaysia is to join their family or working as a labourer or they are the children coming to join their families or illegal workers just taking leave to go back to their countries, or any other possible reasons, there could not be any evidence to suggest that they were being exploited as to presume they were trafficked person. The scenario in the case of *Siti Rashidah Razali & Yang Lain lwn. PP* [2011] 9 CLJ 459 is an example where no exploitation was involved. Persons arrested were not trafficked persons in that case. They were not in need of protection! The fact of that case was that ten adults and three children were arrested in the house of appellants as they have no travel document. From the statement of those subjects they came to Malaysia to look for a job and one of them came along with her three daughters to join her husband who has been working here for some time. They were treated well by the appellants. They were provided food, shelter and free to watch television and even free to go out. From the subjects' statement there was no single piece of evidence showing exploitation has been practiced upon them. They were not trafficked person. They do not want the protection by the Malaysian authorities. What they actually want was to get jobs and the wife want to accompany her husband and the children want to be with their father.

**[11]** It is important to appreciate that Protection Order is not simply to protect persons who were not in need of protection and where no substantial activity lead to the substantial offence of trafficking in person was revealed. It is necessary to understand clearly the purpose of protection. It is to save person trapped in activities of trafficking in person. If the subject enters into Malaysia without travel document or permit, that does not straight away make them a victim or a trafficked person and should be protected. See *Siti Rashidah Razali & Yang Lain lwn. PP* (*supra*), trafficking in person is defined under s. 2 of the Act. Those elements of trafficked person should be looked into in determining whether the protection is needed or not.

**[12]** The object of the Protection Order is to protect the subject from being exploited or continuously exploited. If from the investigation, the subject does not fall under the definition of trafficked person and only comes under the definition of illegal immigrants, then no protection order should be granted. If the Magistrate found that the subjects are only illegal immigrants, they shouldn't be placed at protection home, but to be in immigration depot waiting to be sent back to their countries or to be prosecuted. By ordering them to be placed under protection home, it defeats the purpose of establishing the protection scheme itself, and the subjects instead of getting the job or sent to their countries, or treated as illegal immigrant will get the special treatment of protection.

**[13]** Section 41A states: "This Part shall not apply to a smuggled migrant unless such smuggled migrant is a trafficked person." Therefore, provisions of Protection Order do not apply to these four subjects as they were not trafficked person and Protection Order is set aside.